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Judicial Misconduct During Jury Deliberations

By Bennett L. Gershman*

The author considers the two principal types of improper judicial behavior that may occur during the jury deliberation process. Judicial conduct that attempts to place undue pressure on a jury to reach a verdict may include verdict-urging instructions, threats and intimidation, and inquiry into the numerical division of the jury on the merits of the verdict. Judicial participation in private, ex parte communications with jurors may also subvert orderly trial procedure and undermine the impartiality of the jury. Neither kind of judicial conduct may be allowed to compel a verdict from a jury.

The relationship between judge and jury is never more intense than during the jury deliberation process. During this period, the judge exerts considerable influence over the jury, and he must use that influence prudently and sensitively. The judge ministers to the jury's personal needs, controls the deliberation schedule, facilitates review of evidence, answers jury questions about legal and factual issues, reiterates legal instructions, investigates allegations of irregularities, and determines the overall pace and extent of deliberations. In exercising these functions, the judge must strive to maintain a delicate balance between affording the jury sufficient autonomy to reach conscientiously no decision and at the same time urge the jury without improper pressure to reach a fair and an impartial verdict. This tension between the interest in conscientious disagreement and the interest in a verdict makes the jury deliberation process a fertile setting for judicial misconduct.

Two principal kinds of improper judicial behavior can occur during this process: first, judicial conduct that attempts to place undue pressure on a jury to reach a verdict, and second, judicial participation in private, ex parte communications with jurors. Each of these topics is discussed below.

Coercing a Verdict

Verdict-Urging Instructions

"The very object of the jury system," the United States Supreme Court wrote in *Allen v. United States*, "is to secure

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unanimity by a comparison of views, and by arguments among the jurors themselves."¹ There is no requirement, however, that a jury agree. A hung jury is a legitimate end of a trial.² This inherent tension between encouraging legitimate agreement while not discouraging principled dissent has been at the root of the controversy over the degree of pressure that a judge may employ in urging a deadlocked jury to reach an agreement.³ The so-called *Allen* charge, from the decision bearing that name, has been the subject of considerable debate since the case was decided nearly 100 years ago.⁴ Known variously as the "dynamite"

¹ *Allen v. United States*, 164 U.S. 492, 501 (1896). There is no obligation on the part of a judge to give any special instruction when a jury reports disagreement. The judge may simply elect to declare a mistrial. *United States v. See*, 505 F.2d 845 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). There may be double-jeopardy concerns, however, in discharging prematurely a deliberating jury. *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972) (discharge of jury after it had deliberated for eleven hours without attempting to determine whether it could reach a verdict prevented retrial on double-jeopardy grounds).

² The hung jury has been characterized as "the jury system's most interesting phenomenon. In one sense it marks a failure of the system, since it necessarily brings a declaration of a mistrial in its wake. In another sense, it is a valued assurance of integrity, since it can serve to protect the dissent of a minority." H. Kalven & H. Zeisel, *The American Jury* 453 (1966). See *Arizona v. Washington*, 434 U.S. 497, 509 (1978) (defendant's right to have trial completed by particular jury must be weighed against defendant's right to considered judgment of all jurors, rather than a judgment resulting from pressures of "protracted and exhausting" deliberations); *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir.) (Brown, J., dissenting) ("I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise"), *cert. denied*, 370 U.S. 955 (1962); *State v. Flint*, 114 Idaho 806, 761 P.2d 1158, 1164 (1988) ("the hung jury is not a jurisprudential failure, but rather is a commendation on the fair and evenhanded administration of justice"). In their classic study, *The American Jury*, Professors Kalven and Zeisel found that more than 5 percent of all juries end in a mistrial. H. Kalven & H. Zeisel, *supra*.

It should be noted that many jurisdictions do not require unanimity in civil cases, and five states permit a conviction on less than a unanimous verdict. H. Kalven & H. Zeisel, *supra*, at 461 n.6. Moreover, a jury may be authorized to return a partial verdict on one or more defendants or one or more offenses. N.Y. Crim. Proc. Law § 310.70 (McKinney 1988). A judge may ask the jury to render such a partial verdict and then resume deliberations on the remaining defendants and charges. See *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984); *Morgan v. United States*, 380 F.2d 686 (9th Cir. 1967), *cert. denied*, 390 U.S. 962 (1968). A judge should be careful, however, not to suggest that the jury compromise its conscientiously held beliefs for the sake of expediency. *United States v. Smoot*, 463 F.2d 1221 (D.C. Cir. 1972).

³ Every federal appellate court, and virtually every state jurisdiction, uses some form of a supplemental jury charge. See *Lowenfield v. Phelps*, 484 U.S. 231, 238 n.1 (1988). Note, "Deadlocked Juries and the *Allen* Charge," 37 Me. L. Rev. 167 (1985).

⁴ *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969), *cert. denied*, 396

charge,⁵ the "nitroglycerin" charge,⁶ the "shotgun" instruction,⁷ and the "third-degree" instruction,⁸ the *Allen* charge is a supplemental instruction that, in essence, admonishes a deadlocked jury to (1) decide the case if it can conscientiously do so; (2) give deference to the views of other jurors with the objective of being convinced, and (3) urge minority jurors to reconsider the reasonableness of their convictions. The Supreme Court described the instructions as follows:

These instructions were quite lengthy, and were, in substance, that in a large proportion of cases, absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.⁹

U.S. 837 (*Allen* charge an unwarranted judicial encroachment of exclusive province of the jury); *United States v. Thomas*, 449 F.2d 1177, 1184 n.45, 1187 (D.C. Cir. 1971) (*en banc*) (rejecting *Allen* charge as unduly coercive); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); *Fields v. State*, 487 P.2d 831, 840 (Alaska 1971) (*Allen* charge "less an object of commendation than toleration"); *State v. Randall*, 137 Mont. 534, 353 P.2d 1054 (1960) (rejecting *Allen* charge); *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959) (same). See also Note, "On Instructing Deadlocked Juries," 78 Yale L.J. 100 (1968); Note, "Due Process, Judicial Economy, and the Hung Jury: A Reexamination of the *Allen* Charge," 53 Va. L. Rev. (1967); Comment, "Deadlocked Juries and Dynamite: A Critical Look at the '*Allen* Charge,'" 31 U. Chi. L. Rev. 386 (1964). See also Annotation, "Instructions Urging Dissenting Jurors in State Criminal Cases to Give Due Consideration to Opinion of Majority (*Allen* Charge)—Modern Cases," 97 A.L.R.3d 96 (1980); Annotation, "Verdict-Urging Instructions in Civil Case Stressing Desirability and Importance of Agreement," 38 A.L.R.3d 1281 (1971).

⁵ *Green v. United States*, 309 F.2d 852, 853 (5th Cir. 1962).

⁶ *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir.) (Brown, J., concurring and dissenting), *cert. denied*, 370 U.S. 955 (1962).

⁷ *State v. Nelson*, 63 N.M. 428, 431, 321 P.2d 202, 204 (1958).

⁸ *Leech v. People*, 112 Colo. 120, 123, 146 P.2d 346, 347 (1944). *Allen* has also been described as "a sharp punch to the jury, reminding them of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict." *United States v. Anderton*, 679 F.2d 1199, 1203 (5th Cir. 1982).

⁹ *Allen*, 164 U.S. at 501.

Embellishments of the *Allen* charge have elicited tolerant as well as intolerant responses by the courts. These additions have included reminding jurors of the expense and inconvenience of a retrial¹⁰ or that the case would have to be retried by another jury, should the present jury fail to reach a verdict.¹¹

The principal concern over the *Allen* charge is that it pressures minority jurors to surrender their principles by giving them the impression that the judge agrees with the majority viewpoint and by threatening continued confinement until a verdict is reached.¹² Recognition that other jurors must remain confined because of a minority juror's individual beliefs necessarily produces strong pressures to reach agreement that often have little to do with the merits of the case. Moreover, some critics ask whether the purported societal gains in fewer retrials as a result of the *Allen* charge are offset by the appellate complications in determining whether the trial judge gave a correct charge at the correct point in time during the deliberations.¹³

Although the *Allen* charge or some similar variation continues to be an accepted instruction in many jurisdictions,¹⁴ several federal¹⁵ and state¹⁶ appellate courts, pursuant to their supervisory

¹⁰ *United States v. Smith*, 303 F.2d 341 (4th Cir. 1962); *State v. Flint*, 114 Idaho 806, 761 P.2d 1158 (1988); *Golden v. First City Nat'l Bank*, 751 S.W.2d 639 (Tex. Ct. App. 1988); *Vanderbilt Univ. v. Steely*, 566 S.W.2d 853 (Tenn. 1978).

¹¹ *United States v. Porter*, 881 F.2d 878 (10th Cir.), *cert. denied*, 110 S. Ct. 348 (1989); *United States v. Smith*, 857 F.2d 682 (10th Cir. 1988); *Hodges v. United States*, 408 F.2d 543 (8th Cir. 1969).

¹² Such an instruction can have an even more deleterious effect when the identity of the recalcitrant jurors is known and they are, in effect, singled out. See *Indiana State Highway Comm'n v. Vanderbur*, 432 N.E.2d 418 (Ind. Ct. App. 1982).

¹³ *Andrews v. United States*, 309 F.2d 127 (5th Cir. 1962), *cert. denied*, 372 U.S. 946 (1963) (Wisdom, J., dissenting) ("[Allen's] time-saving merits in the district court are more than nullified by the complications it causes on appeal when the reviewing court must determine whether in the circumstances of a particular case the trial judge applied the charge properly—in substance and timing").

¹⁴ The Supreme Court recently reaffirmed the principles underlying *Allen*. *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) ("[t]he continuing validity of this Court's observations in *Allen* are beyond dispute,"). See *Kawakita v. United States*, 343 U.S. 717 (1952) (*Allen* charge assumed to be appropriate instruction to deadlocked juries). See also Note, note 3 *supra*.

¹⁵ Several circuit courts have indicated disapproval of its use. See *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971), *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

¹⁶ Several states have banned the *Allen* charge. See *State v. Flint*, 114 Idaho 806, 761 P.2d 1158 (1988), *People v. Gainer*, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977); *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959); *State v.*

powers, have either abandoned *Allen* entirely or severely limited its use. Many of these courts favor the standard proposed by the American Bar Association (ABA), which recommends a five-part instruction upon which a deadlocked jury may properly be advised.¹⁷ Some courts, although allowing an *Allen*-type instruction, do not permit any extensions or alterations, indicating that the instruction is the farthest limit in verdict-urging language that they will tolerate.¹⁸

Reviewing courts examine the totality of the circumstances surrounding the use of the charge and proceed on a case-by-case basis "to determine whether the taint of coercion was present."¹⁹ These courts analyze the content of the instruction for particularly coercive language,²⁰ the failure to give an instruction balancing

Randall, 137 Mont. 534, 353 P.2d 1054 (1960); *Burnette v. State*, 280 Md. 88, 371 A.2d 663 (1977). It is also improper to give an *Allen* charge during the penalty phase of a capital trial. See *Rush v. State*, 491 A.2d 439 (Del. Super. 1985); *Rose v. State*, 425 So. 2d 521 (Fla. Super.), *cert. denied*, 461 U.S. 909 (1983).

¹⁷ This portion of the ABA's recommended instruction reads as follows:

- (i) [T]hat in order to return a verdict, each juror must agree thereto;
- (ii) [T]hat jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (iii) [T]hat each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
- (iv) [T]hat in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
- (v) [T]hat no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

ABA, *Standards for Criminal Justice* § 15-4.4 (2d ed. 1986).

Several federal and state courts have adopted this standard. See Note, note 3 *supra*, at 167, 171-172 n.35 (1985) (collecting cases).

¹⁸ *Potter v. United States*, 691 F.2d 1275 (8th Cir. 1982) (improper "departures" impose almost impossible task of weighing prejudicial impact of variations); *United States v. Harris*, 391 F.2d 348, 354 (6th Cir.), *cert. denied*, 393 U.S. 874 (1968) (charge "approaches the limits beyond which a trial court should not venture in urging a jury to reach a verdict"); *Vanderbilt Univ. v. Steely*, 566 S.W.2d 853 (Tenn. 1978) (court requires "strict adherence" to its previously mandated charge).

¹⁹ *Munroe v. United States*, 424 F.2d 243, 246 (10th Cir. 1970). See *United States v. Lindell*, 881 F.2d 1313, 1321 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1152 (1990).

²⁰ *United States v. Porter*, 881 F.2d 878, 888 (10th Cir.), *cert. denied*, 110 S. Ct. 348 (1989) (court must scrutinize language of instruction and its incorporation with other instructions); *United States v. Young*, 702 F.2d 133 (8th Cir. 1983) ("Allen charges must be utilized with great care and scrutinized carefully"); *United States v. Stewart*, 513 F.2d 957 (2d Cir. 1975) (improper use of "cancer" analogy but not reversible error).

the interest in agreement with the interest in conscientious decision making,²¹ or the speed with which the jury returned its verdict after having been given the supplemental charge.²² Remarks emphasizing the expense and inconvenience of a retrial,²³ or suggesting that the case will have to be retried again²⁴ have been criticized as injecting unfair pressure on juries.

Some courts recommend that a deadlock-type instruction be given during the main charge, before the jurors take positions, at a time when there is not yet a minority to feel pressured, in order to ameliorate such pressure on minority jurors if a deadlock should occur.²⁵ An *Allen*-type instruction should be given only when clearly warranted,²⁶ although there is no absolute right for counsel to be forewarned before the *Allen* charge is given.²⁷ Giving such an instruction to a jury that has not indicated a deadlock may be reversible error.²⁸ The failure to object to a verdict-urging instruction, however, may constitute a waiver of the claim on appeal²⁹ or at least diminish the force of the claim

²¹ *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981); *People v. Ali*, 65 A.D.2d 513, 514, 409 N.Y.S.2d 12 (1978), *aff'd*, 47 N.Y.2d 920, 393 N.E.2d 481, 419 N.Y.S.2d 487 (1979).

²² *United States v. Webb*, 816 F.2d 1263 (8th Cir. 1987) (verdict returned fifteen minutes after receiving deadlock instruction); *Hodges v. United States*, 408 F.2d 543, 554 (8th Cir. 1969) (jury continued deliberating for another day before reaching verdict); *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964). See also *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 462 (1978).

²³ *Hodges v. United States*, 408 F.2d 543 (8th Cir. 1969); *Vanderbilt University v. Steely*, 566 S.W.2d 853 (Tenn. 1978).

²⁴ *United States v. Harris*, 391 F.2d 348 (6th Cir.) *cert. denied*, 393 U.S. 874 (1968); *United States v. Smith*, 303 F.2d 341, 343 (4th Cir. 1962).

²⁵ *United States v. McKinney*, 822 F.2d 946, 951 (10th Cir. 1987); *United States v. Brown*, 634 F.2d 1069 (7th Cir. 1980); *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973). See also *People v. Ali*, 47 N.Y.2d 920, 393 N.E.2d 481, 419 N.Y.S.2d 487 (1979) (suggesting that supplemental instruction be given during main charge). The ABA standard also recommends that the instruction be given before the jury retires for deliberation. See ABA, note 17 *supra*, § 15-4.4(a).

²⁶ *Sullivan v. United States*, 414 F.2d 714, 716 (9th Cir. 1969).

²⁷ *United States v. Rapp*, 871 F.2d 957, 967 (11th Cir.), *cert. denied*, 110 S. Ct. 233 (1989).

²⁸ Compare *United States v. Contreras*, 463 F.2d 773 (9th Cir. 1972) (reversible error to give *Allen* charge to jury without any indication jury deadlocked) with *United States v. Martinez*, 446 F.2d 118 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971) (no error to give such charge sua sponte to deliberating jury) and *Souza v. Ellertorpe*, 712 F.2d 1529 (1st Cir. 1983), *cert. denied*, 464 U.S. 1048 (1984) (setting deadline sua sponte held not coercive).

²⁹ *Golden v. First City Nat'l Bank*, 751 S.W.2d 639 (Tex. Ct. App. 1988). But see *United States v. Webb*, 816 F.2d 1263 (8th Cir. 1987) (initial consent to inquiry

by suggesting that the attorney did not at the time believe that the jury was being coerced.³⁰

Threats and Intimidation

As with verdict-urging instructions, a judge must not use other techniques to pressure a jury to reach a verdict. To be sure, there is a fine line between permissible encouragement and impermissible coercion. Nevertheless, despite the judge's desire for a verdict, he must not fail to advise jurors that they should adhere to their conscience and free will in making their decision. Otherwise, legitimate dissenting jurors will feel that they are somehow responsible for undermining the cause of justice.

Judicial demands for a verdict are ordinarily found coercive because they impact most heavily upon the recalcitrant jurors, implying that these jurors are delaying the cause of justice. The Supreme Court has addressed this problem on several occasions. In *Jenkins v. United States*,³¹ the Court reversed a conviction when the judge admonished a deadlocked jury: "You have got to reach a decision in this case." Although no specific prejudice was found, inherent prejudice existed based on the unacceptable risk that impermissible factors would produce a decision.³² Similar strident warnings that, in effect, order a jury to agree on a verdict have been held legally coercive. Thus, statements such as, "I'm going to get a verdict in this case,"³³ "There has to be a verdict,"³⁴ "You are supposed to find guilt or innocence here—do your job,"³⁵ or "It is the intention of this court to keep its jury in session for as long as it may take to arrive at a verdict"³⁶ have been held impermissibly coercive. Also coercive is openly telling a jury that the case is a simple one since such a statement

into jury's numerical division did not waive claim as to giving of subsequent *Allen* charge).

³⁰ *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988).

³¹ 380 U.S. 445, 446 (1965).

³² *Holbrook v. Flynn*, 475 U.S. 560, 570 (1976) (the test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play").

³³ *Ex parte, Morris*, 465 So. 2d 1180, 1182 (Ala. 1985).

³⁴ *United States v. Assi*, 748 F.2d 62, 68 (2d Cir. 1984).

³⁵ *Jackson v. United States*, 368 A.2d 1140, 1142 (D.C. 1977).

³⁶ *People v. Carter*, 40 N.Y.2d 933, 358 N.E.2d 517, 389 N.Y.S.2d 835 (1976).

implies that the case warrants only desultory deliberation, and thereby risks putting undue pressure on legitimate dissenting jurors that the judge considers their position untenable. Thus, a judge's remarks that he "could have decided this case in ten minutes"³⁷ or that "there should [not] be any great difficulty in arriving at a verdict in this case"³⁸ are intimidating and coercive. By contrast, remarks that strongly encourage jurors to adhere to their oaths and try to reach a verdict one way or the other have been held not coercive when the judge's statements do not appear to impose on any juror the surrender of her beliefs.³⁹

A judge must be careful when giving supplemental instructions to avoid singling out individual minority jurors, either directly or by implication, with intimidating remarks that convey the message that they must agree with the majority.⁴⁰ When a judge learns during deliberations of a juror problem that, if unattended, might later require the granting of a mistrial, the judge should immediately intervene to obviate the problem.⁴¹ This intervention includes the power to investigate allegations of juror misconduct to determine whether cause exists to replace an offending juror.⁴²

³⁷ *People v. Riley*, 70 N.Y.2d 523, 532, 517 N.E.2d 520, 522 N.Y.S.2d 842 (1987).

³⁸ *Boyet v. United States*, 48 F.2d 482, 483 (5th Cir. 1931).

³⁹ *United States v. Markey*, 693 F.2d 594 (6th Cir. 1982) (advising jury that courthouse would be available the following morning, Christmas Eve, if jury unable to reach a consensus that afternoon not coercive); *Williams v. United States*, 419 F.2d 740 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 872 (1972) (ordering jury back to jury room after poll produced confusion among one juror not coercive); *Richardson v. State*, 508 So. 2d 289 (Ala. Crim. App. 1987) (inquiring into jury's numerical division and dissuading jury from reviewing certain evidence not coercive); *People v. Pagan*, 45 N.Y.2d 725, 380 N.E.2d 299, 408 N.Y.S.2d 473 (1978) (admonishing jury that case was simple and that they were expected to arrive at verdict not coercive); *People v. Sharff*, 38 N.Y.2d 751, 343 N.E.2d 765, 381 N.Y.S.2d 48 (1975) (advising jury that it would be sequestered if it did not reach a verdict not coercive).

⁴⁰ *Indiana State Highway Comm'n v. Vanderbur*, 432 N.E.2d 418 (Ind. Ct. App. 1982) (deadlock instruction given after identity of recalcitrant jurors known); *People v. Hudson*, 104 A.D.2d 157, 482 N.Y.S.2d 1009 (1984) (judge directs intimidating remarks specifically at two dissenting jurors); *People v. Perfetto*, 96 A.D.2d 517, 464 N.Y.S.2d 818 (1983) (singling out and confronting lone minority juror inherently coercive).

⁴¹ *People v. Keenan*, 46 Cal. 3d 478, 758 P.2d 1081, 250 Cal. Rptr. 550 (1988) (juror claimed to be unable to vote for death penalty).

⁴² *People v. Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986) (reports that juror was intoxicated on marijuana); *People v. McNeal*, 90 Cal. App. 3d 830, 153 Cal. Rptr. 706 (1979) (juror indicates personal knowledge of disputed

Any intervention must be conducted with care, however, so as to minimize pressure on legitimate minority jurors by advising them that no verdict is being demanded and that a change in vote must be a conscientious one.⁴³ No juror should be induced to agree to a verdict by fear that a failure to agree will be regarded as reflecting upon either his intelligence or integrity.⁴⁴ Thus, it was "egregious" for a judge, after learning that a juror was having difficulty following her oath, to direct an instruction toward that juror that intimated she was guilty of either perjury or negligence in her response to questions on voir dire, and that she was not complying with her oath as a juror.⁴⁵ If it becomes clear that a juror is incapable of fairly reaching a verdict, the declaration of a mistrial may be in order.⁴⁶

Singling out a dissenting juror and engaging in a one-on-one discussion as to whether the juror is obstructing an agreement on a verdict is inherently coercive.⁴⁷ Threatening the jury with deliberations for an indefinite period until a lone dissenter capitulates is obviously coercive.⁴⁸ A judge acts properly, however, when he conducts a discrete and nonthreatening investigation to evaluate a report that a juror may harbor a disqualifying bias or is otherwise incapable of rendering a verdict.⁴⁹

A judge may not place a jury under any explicit time constraints that seek to induce a verdict more swiftly than the ends of justice will allow.⁵⁰ The amount of time that a deliberating

facts).

The broad discretionary authority of a judge to investigate allegations of juror irregularity during the trial is well settled. See *United States v. Gagnon*, 470 U.S. 522 (1985); *Rushen v. Spain*, 464 U.S. 114 (1983). The procedures adopted, however, must be protective of a defendant's right to a fair trial and an impartial jury. *United States v. Yonn*, 702 F.2d 1341 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983); *United States v. Dominguez*, 615 F.2d 1093 (5th Cir. 1980). A judge also has the power to dismiss a juror who is "unable or disqualified to perform his duties." Fed. R. Crim. P. 24(c). See *United States v. Rodriguez*, 573 F.2d 330 (5th Cir. 1978).

⁴³ *United States v. Amaya*, 509 F.2d 8, 13 (5th Cir. 1975), *cert. denied*, 429 U.S. 1101 (1977).

⁴⁴ *Jackson v. United States*, 368 A.2d 1140, 1142 (D.C. App. 1977).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *People v. Perfetto*, 96 A.D.2d 517, 464 N.Y.S.2d 818 (1983).

⁴⁸ *People v. Carter*, 40 N.Y.2d 933, 358 N.E.2d 517, 389 N.Y.S.2d 835 (1976).

⁴⁹ *People v. Keenan*, 46 Cal. 3d 478, 758 P.2d 1081, 250 Cal. Rptr. 550 (1988).

⁵⁰ *United States v. Diharce-Estrada*, 526 F.2d 637, 640 (5th Cir. 1976) ("court's opening remarks to the jurors emphasizing the dispatch he expected, coupled with

jury should be kept together and the determination of whether a mistrial should be declared if the jury cannot agree are matters within a judge's sound discretion.⁵¹ Ordinarily, a jury must have deliberated for an extensive period, and the judge must be satisfied that agreement is unlikely within a reasonable time before a judge may discharge the jury.⁵² Asking a jury to "see if you can't reach a verdict within an hour" is plainly coercive because it emphasizes speed over care and infers that the judge is anxious to conclude the case.⁵³ Less explicit remarks may still be found coercive if they imply a time frame within which a verdict is to be reached.⁵⁴ Even concern for the jury's well-being does not justify the judge's placing a time limit on when a verdict must be reached.⁵⁵ A judge faced with emergent circumstances must explore reasonable alternatives, including the declaration of a mistrial. Not all time-related remarks, however, are coercive. The test is whether from all the circumstances the judge's remarks conveyed the impression that it was more important for the jury to be quick than to be thoughtful.⁵⁶

Nor may a judge threaten the jury with sequestration, express an intention to confine them indefinitely, or impose unendurable conditions upon a jury as a means of pressuring them to reach a

the immoderate treatment accorded defense counsel for his allegedly unjustified attempts to delay the trial, can only be judged by us to have put pressure on the jury to reach a verdict more swiftly than the ends of justice will allow"); *People v. Keenan*, 46 Cal. 3d 478, 758 P.2d 1081, 250 Cal. Rptr. 550 (1988) (judge's remarks on Friday that he would "appreciate" a verdict on Monday not coercive due to cautionary instructions to minority jurors not to surrender conscientiously held beliefs).

⁵¹ *People v. Sheldon*, 136 A.D.2d 761, 523 N.Y.S.2d 220 (1988). Deliberation time allowed varies with the length of the trial. An average hung jury deliberates longer than the average jury that reaches a verdict by a ratio of about three-to-one. H. Kalven & H. Zeisel, note 2 *supra*, at 459.

⁵² *Id.* It should be noted that serious double jeopardy claims would arise if the judge declares a mistrial prematurely. See *Arizona v. Washington*, 434 U.S. 497 (1978); *Logan v. United States*, 144 U.S. 263 (1892).

⁵³ *Burroughs v. United States*, 365 F.2d 431, 433 (10th Cir. 1966).

⁵⁴ *United States v. Amaya*, 509 F.2d 8, 9 (5th Cir. 1975), *cert. denied*, 429 U.S. 1101 (1977) (suggesting that jury try to reach a verdict in one hour, and referring to previous jury deliberation that lasted nine days, held unduly coercive).

⁵⁵ *Lucas v. American Mfg. Co.*, 630 F.2d 291, 293 (5th Cir. 1980) (advising jury that due to impending hurricane it must reach verdict within fifteen minutes was coercive).

⁵⁶ *United States v. Markey*, 693 F.2d 594 (6th Cir. 1982); *United States v. Green*, 523 F.2d 229 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *Butler v. State*, 185 Tenn. 686, 207 S.W.2d 584 (1948).

verdict.⁵⁷ Thus, requiring a jury to deliberate for twenty-seven hours without sleep was found unduly coercive.⁵⁸ Similarly improper was requiring a jury to deliberate until 5:25 A.M., notwithstanding their impatience and fatigue.⁵⁹ Under appropriate circumstances, the availability of sequestration at a hotel for the night may be noted as a possibility, although not as a threat.⁶⁰ Threatening to keep the jury "in session" and "incommunicado" until a verdict is reached is intimidating and coercive,⁶¹ as are threats of sequestration when the judge is aware that some of the jurors have conflicts with such an arrangement.⁶²

Problems occasionally arise during the polling of a jury following the rendition of a verdict.⁶³ A valid verdict is not dependent on what a juror agrees to in the jury room but, rather, on what the juror agrees to when the jury gives its verdict in open court.⁶⁴ A juror has the right when polled to dissent from a verdict to which he had agreed in the jury room.⁶⁵ When this type

⁵⁷ *Boyett v. United States*, 48 F.2d 482, 484 (5th Cir. 1931) (judge's remarks suggested that some of jurors derelict in their duty and that judge intended to punish them by keeping them confined indefinitely until they reached a verdict). See also *United States v. Chaney*, 559 F.2d 1094 (7th Cir. 1977) (supplemental charge could have been understood as demanding quick verdict to avoid being locked up for night).

⁵⁸ *State v. Green*, 254 Iowa 1379, 121 N.W.2d 89 (1963).

⁵⁹ *Commonwealth v. Clark*, 404 Pa. 143, 170 A.2d 847 (1961).

⁶⁰ Compare *People v. Pagan*, 45 N.Y.2d 725, 380 N.E.2d 299, 408 N.Y.S.2d 473 (1978) (appropriate reference to possible sequestration) and *People v. Sharff*, 38 N.Y.2d 751, 343 N.E.2d 765, 381 N.Y.S.2d 48 (1975) (same) with *People v. Hudson*, 104 A.D.2d 157, 482 N.Y.S.2d 1009 (1984) (threatening jurors with sequestration because of two recalcitrant jurors).

⁶¹ *People v. Carter*, 40 N.Y.2d 933, 358 N.E.2d 517, 389 N.Y.S.2d 835 (1976).

⁶² *State v. Jones*, 292 N.C. 513, 234 S.E.2d 555 (1977) (judge knew that some of jurors had abnormal conflicts and had promised two jurors that court would not be held over weekend, but nevertheless gratuitously threatened to confine them over weekend unless they reached verdict).

⁶³ Section 15-4.5 of the *ABA Standards for Criminal Justice* provides:

When a verdict has been returned and before the jury has dispersed, the jury shall be polled at the request of any party or upon the court's own motion. The poll shall be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

ABA, note 17 *supra*, § 15-4.5. See *United States v. Fiorilla*, 850 F.2d 172 (3d Cir.) (*en banc*) (poll not impermissibly coercive), *cert. denied*, 488 U.S. 966 (1988).

⁶⁴ *Bruce v. Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224, 225 (D.C. Cir. 1942).

⁶⁵ *Id.* It should be noted, however, that there is no absolute right to have a jury

of dissent occurs, the jury may be directed to continue their deliberations, or they may be discharged.⁶⁶ If the jury is directed to continue deliberations, no time limit should be set.⁶⁷ Moreover, it is improper for the judge to interrogate the polled juror, enter into an argument with that juror, or require an explanation of his change of position.⁶⁸

When polling reveals the possibility of some irregularity during the deliberation process, the judge must inquire into the problem.⁶⁹ This inquiry might include questioning the juror privately about matters not within the deliberative process⁷⁰ and then taking remedial action, such as requiring further deliberations, attempting to dissipate the cause of the problem, replacing the juror, or declaring a mistrial.⁷¹

Inquiry Into Numerical Division

A judge's inquiry into the numerical division of the jury on the merits of the verdict may be impermissibly coercive on dissenting jurors⁷² regardless of whether the judge's inquiry specifically asks the jury which side is favored. In *Burton v. United States*,⁷³ the Supreme Court criticized the practice of

polled. *United States v. Shepherd*, 576 F.2d 719, 724 (7th Cir.) *cert. denied*, 439 U.S. 852 (1978). If the request for a poll is not made before the verdict is recorded, it comes too late. *Id.* at 724 n.3.

⁶⁶ *United States v. Musto*, 540 F. Supp. 318, 339 (D.N.J. 1982). Rule 31(d) of the Federal Rules of Criminal Procedure states:

When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

⁶⁷ *State v. Sutton*, 31 N.C. App. 697, 230 S.E.2d 572 (1976) (judge sends jury back to deliberate and tells them "to take no more than five minutes to ascertain whether or not the verdict which you reported yesterday was unanimous").

⁶⁸ Compare *Bruce v. Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224 (D.C. Cir. 1942) (judge demands explanation for juror's apparent change of position) with *Williams v. United States*, 419 F.2d 740 (D.C. Cir. 1969) (judge acts properly to attempt to clear up confusion from poll).

⁶⁹ *People v. Pickett*, 61 N.Y.2d 773, 461 N.E.2d 294, 473 N.Y.S.2d 157 (1984) (juror responds that verdict was arrived at "under duress").

⁷⁰ The judge should be careful, however, not to inquire about matters that occurred during the deliberations themselves. *Id.*

⁷¹ *Id.*

⁷² See Annotation, "Propriety and Prejudicial Effect of Trial Court's Inquiry as to Numerical Division of Jury," 77 A.L.R.3d 769 (1977).

⁷³ 196 U.S. 283 (1905).

making such an inquiry, noting that such questioning serves no useful purpose, and can be harmful.⁷⁴ Later, in *Brasfield v. United States*,⁷⁵ the Court held that any judicial inquiry into a deliberating jury's numerical division is per se reversible error. *Brasfield* elaborated on the reasons for condemning the practice of inquiring into a jury's numerical division:

We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.⁷⁶

Brasfield can be understood as a prophylactic rule designed to protect the jury from the unpredictable effects of both the inquiry itself and the jury's knowledge of the judge's awareness of its division. Both can exert subtle pressure on some jurors. The *Brasfield* decision reflects a legitimate concern that trial judges scrupulously refrain from encroaching into the jury's deliberative process to ensure that the deliberations are candid and uninhibited. Moreover, when coupled with verdict-urging instructions, the inquiry can create the impression that the court agrees with the majority, thereby reinforcing the majority's determination and melting the resistance of the minority.⁷⁷

⁷⁴ The Court observed: "[W]e do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge." *Id.* at 308.

⁷⁵ 272 U.S. 448 (1926).

⁷⁶ *Id.* at 450. For other cases condemning the practice, see *United States v. Webb*, 816 F.2d 1263 (8th Cir. 1987); *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984); *United States v. Noah*, 594 F.2d 1303 (9th Cir. 1979); *United States v. Hayes*, 446 F.2d 309 (5th Cir. 1961); *United States v. Cook*, 254 F.2d 871 (5th Cir. 1958). See also E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 5.22 (3d ed. 1977) (a "cardinal rule that the court should not ask the jury as to their numerical division").

⁷⁷ *Smith v. United States*, 542 A.2d 823 (D.C. App. 1988) (when jury reveals its numerical division and judge then gives deadlock instruction, "potential for coercion is great"); *People v. Wilson*, 390 Mich. 689, 692, 213 N.W.2d 193, 195 (1973) (inquiry ordinarily "carries the improper suggestion that the state of numerical

Although there has been some disagreement,⁷⁸ *Brasfield* clearly was not based on the constitutional dictates of due process but, rather, represented an exercise of the Supreme Court's supervisory powers over the lower federal courts.⁷⁹ Inasmuch as the decision was not constitutionally grounded, state courts need not follow it,⁸⁰ and federal courts are not required to invoke its sanction when reviewing state habeas corpus proceedings alleging a *Brasfield* violation.⁸¹

Those state courts that follow the underlying rationale of *Brasfield*, if not its automatic reversal policy, examine whether the inquiry was unduly coercive. These courts make this determination by analyzing the totality of the circumstances.⁸² For example, repetition of the numerical inquiry aggravates the impropriety.⁸³ Administering verdict-urging instructions in conjunction with the numerical inquiry, as noted above, exacerbates the coercive potential by placing undue pressure on minority jurors.⁸⁴ The absence of ameliorative language is also a relevant factor.⁸⁵ Counsel's request for the numerical inquiry, however, can constitute a waiver of the claim.⁸⁶

division reflects the stage of the deliberations. It has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority").

⁷⁸ See *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (1976), *cert. denied*, 89 N.M. 206, 549 P.2d 284, and 455 U.S. 845 (1981); *People v. Wilson*, 390 Mich. 689, 213 N.W.2d 193 (1973).

⁷⁹ *Lowenfield v. Phelps*, 484 U.S. 231, 239-240 (1988).

⁸⁰ Several state courts see nothing inherently wrong in such an inquiry. See *State v. Morant*, 758 S.W.2d 110 (Mo. Ct. App. 1988); *People v. Carter*, 68 Cal. 2d 810, 69 Cal. Rptr. 297, 442 P.2d 353 (1968); *Griffin v. State*, 2 Ark. App. 145, 617 S.W.2d 21 (1981).

⁸¹ *Lowenfield v. Phelps*, 484 U.S. at 240 n.3. See *Locks v. Sumner*, 703 F.2d 403 (9th Cir.), *cert. denied*, 464 U.S. 933 (1983); *United States ex rel. Kirk v. Director, Dep't of Corrections*, 678 F.2d 723 (7th Cir. 1982); *Cornell v. Iowa*, 628 F.2d 1044 (8th Cir.), *cert. denied*, 449 U.S. 1126 (1980); *Ellis v. Reed*, 596 F.2d 1195 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979).

⁸² *Richardson v. State*, 508 So. 2d 289 (Ala. Crim. App. 1987); *State v. McEntire*, 323 S.E.2d 439 (N.C. Ct. App. 1984); *People v. Santiago*, 108 Ill. App. 3d 787, 64 Ill. Dec. 319, 439 N.E.2d 984 (1982); *State v. Roberts*, 131 Ariz. 513, 642 P.2d 858 (1982).

⁸³ *Santiago*, 108 Ill. App. 3d at 787.

⁸⁴ *United States v. Webb*, 816 F.2d 1263 (8th Cir. 1987); *Smith v. United States*, 542 A.2d 823 (D.C. App. 1988); *State v. Rickerson*, 95 N.M. 666, 625 P.2d 1183, *cert. denied*, 454 U.S. 845 (1981).

⁸⁵ *Jackson v. United States*, 368 A.2d 1140 (D.C. App. 1977).

⁸⁶ *Marsh v. Cupp*, 536 F.2d 1287 (9th Cir.), *cert. denied*, 429 U.S. 981 (1976).

Even unsolicited disclosures to the judge of the jury's division can be grounds for reversal.⁸⁷ A jury note to the judge, for example, can reveal the jury's division, and even the identity of the dissenting jurors.⁸⁸ Giving a verdict-urging instruction in such circumstances could reasonably be interpreted as being directed at the dissenters and thereby be found impermissibly coercive of these jurors.⁸⁹ A judge who learns of the jury's division through an unsolicited report may in some circumstances be required to declare a mistrial.⁹⁰ Unsolicited disclosures can also result in reversal when, for example, a judge's inquiry concerning the jury's request for a review of testimony develops into an inquiry concerning the jury's division.⁹¹ Such an occurrence can create a "coercive atmosphere," particularly when the judge singles out individual jurors for questioning.⁹²

A judge's inquiry into the jury's numerical split on matters unrelated to the merits of the verdict is permissible. The Supreme Court recently addressed this issue in *Lowenfield v. Phelps*.⁹³ There, after being advised that the jury was deadlocked, the judge in open court asked the jurors to write on a piece of paper his or her name and whether further deliberations would be helpful in arriving at a verdict. The jurors complied. The count was eight affirmative votes and four negative votes. After some confusion, the judge again reiterated the question in slightly different form, and the jury responded, eleven-to-one, that further deliberations would be helpful. The judge then reinstructed the jury as to their duty to attempt to reach a verdict.

⁸⁷ *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964). But see *United States v. Rao*, 394 F.2d 354 (2d Cir.) (no error where jury volunteered its division but did not indicate which side it favored), *cert. denied*, 393 U.S. 845 (1968); *People v. Sheldon*, 136 A.D.2d 761, 523 N.Y.S.2d 220 (1988).

It is error for the foreman to reveal the numerical division of the jury. *United States v. Jennings*, 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *Mullin v. United States*, 356 F.2d 368 (D.C. Cir. 1966); *Smith v. United States*, 542 A.2d 823 (D.C. App. 1988).

⁸⁸ *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984); *Jackson v. United States*, 368 A.2d 1140 (D.C. App. 1977).

⁸⁹ *Jackson*, 368 A.2d 1140.

⁹⁰ *Id.* at 1142.

⁹¹ *United States v. Akbar*, 698 F.2d 378 (9th Cir.), *cert. denied*, 461 U.S. 959 (1983).

⁹² *Id.* at 380.

⁹³ 484 U.S. 231 (1988).

The Supreme Court approved the judge's inquiry. Distinguishing *Brasfield*, the Court noted that such an inquiry was clearly different from an inquiry into the merits because there was no reason to believe that a juror who was in the minority on the merits would necessarily conclude that further deliberations would not be helpful. The Court observed:

We believe the type of question asked by the trial court in this case is exactly what the Court in *Brasfield* implicitly approved when it stated: "[An inquiry as to numerical division] serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature of its division."⁹⁴

Although the supplemental instruction and the return of a verdict thirty minutes later suggested the "possibility of coercion,"⁹⁵ defense counsel's failure to object indicated that "the potential for coercion now argued was not apparent to one on the spot."⁹⁶

Ex Parte Communications

A judge should not communicate with the jury on any matter pertaining to the case except after giving notice to the parties and affording them a reasonable opportunity to be present and to be heard.⁹⁷ This rule against *ex parte* contacts is based on concerns of orderly trial procedure and ensuring that the jury remains impartial. Proper procedure requires certain precautions.⁹⁸ The jury's inquiry should be in writing, the note should be marked as a court exhibit and read into the record in the presence of counsel and the parties, counsel should be afforded an opportunity to suggest appropriate responses, and the jury should be recalled.

⁹⁴ *Id.* at 240. See also *Carlton v. United States*, 395 F.2d 10 (8th Cir. 1968), *cert. denied*, 393 U.S. 1030 (1969).

⁹⁵ *Lowenfeld*, 484 U.S. at 240.

⁹⁶ *Id.*

⁹⁷ ABA, note 17 *supra*, § 15-3.7 (judge "should not communicate with a juror or the jury on any aspect of the case itself (as distinguished from matters relating to physical comforts and the like), except after notice to all parties and reasonable opportunity for them to be present"). See also Annotation, "Propriety and Prejudicial Effect, in Federal Criminal Cases, of Communications Between Judge and Jury Members Made in the Absence of Counsel, Regarding the Ability of Jury Members to Continue Deliberations," 64 A.L.R. Fed. 874 (1983); Annotation, "Propriety and Prejudicial Effect, in Federal Civil Cases, of Communications Between Judge and Jury Made Out of Counsel's Presence and After Submission for Deliberations," 32 A.L.R. Fed. 392 (1977).

⁹⁸ *United States v. Ronder*, 639 F.2d 931, 934 (2d Cir. 1981).

The judge should then read into the record the jury's note, and give the response.⁹⁹

The Supreme Court on several occasions has delineated the permissible scope of ex parte contacts between judge and jury. In *Fillippon v. Albion Vein Slate Co.*,¹⁰⁰ a personal injury lawsuit, the deliberating jury sent a note to the judge asking for further instructions about the plaintiff's contributory negligence. The judge sent a written response back to the jury without notifying the parties and without recalling the jury in open court. Concluding that engaging in this ex parte communication was error, the Court observed:

We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction.¹⁰¹

The Court explicitly found that the supplementary instruction was harmful since it related to a substantive element in the case, was legally erroneous, and "was calculated to mislead the jury."¹⁰²

The principle of *Fillippon* was later applied to a criminal case in *Shields v. United States*.¹⁰³ There, the judge similarly responded to a jury note indicating a partial verdict by directing the jury

⁹⁹ Occasionally, the personal nature of a note may make it appropriate to forgo reading it to the entire jury, and recalling the jury into the courtroom may be unnecessary when the inquiry concerns housekeeping details. *Id.*

¹⁰⁰ 250 U.S. 76 (1919).

¹⁰¹ *Id.* at 81.

¹⁰² *Id.* at 82.

¹⁰³ 273 U.S. 583 (1927).

to continue deliberations on the remaining defendants. This communication was not made in open court, and neither the defendants nor their attorneys were present or advised of these interchanges. The Court reversed the conviction without finding any specific prejudice. It noted that "the rule of orderly conduct of jury trial entitl[es] the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the verdict."¹⁰⁴

The *Fillippon-Shields* principle was reaffirmed in *Rogers v. United States*.¹⁰⁵ There, in response to a jury note inquiring whether the judge would accept a guilty verdict with "extreme mercy of the Court," the judge instructed the bailiff "to advise the jury that the Court's answer was in the affirmative."¹⁰⁶ These communications were in private, without notice to defendant or an opportunity for counsel to respond. Pointing out that Rule 43 of the Federal Rules of Criminal Procedure guarantees a defendant the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict," the Court held that the jury's message should have been answered in open court and that defendant's counsel should have been given an opportunity to be heard before the judge responded.¹⁰⁷

Although the Court agreed that a violation of Rule 43 could be harmless, such a conclusion was not warranted here, since the violation was "fraught with potential prejudice."¹⁰⁸ The Court explained that the judge should not have indicated a willingness to accept the jury's request. Rather, the judge should have advised the jury that its request would not be binding on the court and that, in any event, the jury had no sentencing function and was required to reach its verdict without regard to sentence. Moreover, the jury returned its verdict within five minutes of receiving the judge's response, a circumstance that "strongly suggests that the trial judge's response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise."¹⁰⁹

¹⁰⁴ *Id.* at 588-589.

¹⁰⁵ 422 U.S. 35 (1975).

¹⁰⁶ *Id.* at 36.

¹⁰⁷ *Id.* at 39.

¹⁰⁸ *Id.* at 41.

¹⁰⁹ *Id.* at 40.

The requirement and extent of the prejudice that needs to be shown from a judge's ex parte contacts with a deliberating jury was further examined in *United States v. U.S. Gypsum Co.*¹¹⁰ There, during extensive deliberations, the foreman asked to confer with the judge about the condition of the jury. Defense counsel agreed to the judge's proposed ex parte conference. At the meeting, the foreman advised the judge of the deteriorating state of health of the jurors after the lengthy trial and twice indicated that the jury was deadlocked. Near the close of the meeting, the following colloquy took place:¹¹¹

The Court: I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.

Mr. Russell (foreman): I appreciate it. It is a situation I don't know how to help you get what you are after.

The Court: Oh, I am not after anything.

Mr. Russell: You are after a verdict one way or the other.

The Court: Which way it goes doesn't make any difference to me.

The judge informed counsel of the substance of the meeting but omitted reference to the foreman's opinion that the jury was deadlocked and to the foreman's impression that the judge wanted a definite verdict.

The Supreme Court reversed the conviction, finding that the judge's ex parte communications with the jury foreman encroached on the jury's authority and foreclosed a possible "no verdict" outcome by giving the foreman the impression that the judge wanted a verdict. The event was "disturbing" for several reasons. First, just as "any ex parte meeting . . . is pregnant with possibilities for error," the instant case amply demonstrated the "pitfalls inherent in such an enterprise."¹¹² Moreover, "unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury—all the more so when counsel are not present to challenge the statements."¹¹³ Second, any ex parte communication to the jury through one

¹¹⁰ 438 U.S. 422 (1978).

¹¹¹ *Id.* at 432.

¹¹² *Id.* at 460.

¹¹³ *Id.* at 461.

member of the panel risks innocent misstatements of law and misinterpretations whose content cannot be determined.¹¹⁴ Third, the absence of counsel from the meeting and the unavailability of a transcript aggravate the problems of having one juror serve as a conduit for communicating instructions to the whole panel.¹¹⁵ The Court concluded:

Thus, it is not simply the action of the judge in having the private meeting with the jury foreman, standing alone—undesirable as that procedure is—which constitutes the error; rather, it is the fact that the *ex parte* discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling.¹¹⁶

Although no actual prejudice was found, the Court, citing *Jenkins v. United States*,¹¹⁷ determined that inherent prejudice was shown by the jury's swift return of a verdict following the *ex parte* meeting, thereby suggesting a "risk" that the foreman believed that the judge wanted a verdict and then conveyed that impression to the jury.¹¹⁸

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 462.

¹¹⁷ 380 U.S. 445 (1965).

¹¹⁸ *Id.* at 462. The Supreme Court has addressed issues involving *ex parte* contacts between the trial judge and a juror during the trial in two recent decisions.

In *Rushen v. Spain*, 464 U.S. 114 (1983), the Court held in a *per curiam* opinion that the judge's private unrecorded meeting with a juror concerning her fear that certain evidence might upset her, even if a constitutional error, was harmless. This "innocuous" meeting did not include discussion of any factual or legal matters pertaining to the case, and the jury's deliberations were not found to have been biased. Although "the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant," the "day-to-day realities of courtroom life" also have to be considered. *Id.* at 117-119. "There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Id.* at 118. The Court emphasized that *ex parte* contacts could be of serious concern, and that convictions should be overturned when prejudice is shown.

In *United States v. Gagnon*, 470 U.S. 522 (1985), the judge held an *ex parte* meeting with a juror who was concerned about the defendant's sketching her portrait. Defendant's counsel was present at the meeting and did not object. Citing *Rushen*, the Court, in a *per curiam* opinion, held that the mere occurrence of an *ex parte* conversation between judge and juror in the absence of the defendant did not deprive the defendant of any constitutional right. The encounter was a "short interlude in a complex trial" and "was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment." *Id.* at 527. The Court noted that

Federal and state appellate courts ordinarily review *ex parte* communications according to the nature of the communication (i.e., whether it related to a substantive issue in the case or whether it concerned nonsubstantive matters).¹¹⁹ Substantive communications would include communications pertaining to legal and factual issues in the case, whereas nonsubstantive communications relate to the extent of deliberations, the availability of items of evidence, and housekeeping matters, such as meal orders. The courts also examine the manner in which the communication was made and ordinarily apply waiver doctrine when counsel fails to protest the occurrence. The most decisive factor, as the Supreme Court decisions demonstrate, is the potential for prejudice, or the presence or absence of actual prejudice, from the communication.

The courts scrutinize more closely *ex parte* communications that relate to legal or factual matters in the case since such communications can carry a presumption of prejudice in favor of the aggrieved party.¹²⁰ Thus, *ex parte* responses to a jury's question about substantive matters, such as (1) the standard for contributory negligence;¹²¹ (2) the measure of damages under a contract;¹²² (3) principles of estoppel;¹²³ (4) construction of a contract;¹²⁴ (5) interpretation of a criminal statute;¹²⁵ (6) the need for unanimity for a verdict;¹²⁶ (7) separability of substantive

defendants could have done nothing at the conference, and, indeed, their presence might have been counterproductive. The Court also held that counsel's failure to object to defendants' presence constituted a waiver of defendant's statutory right of presence under Federal Rule of Criminal Procedure 43. *Id.*

See also *United States v. Madrid*, 842 F.2d 1090 (9th Cir.), *cert. denied*, 488 U.S. 912 (1988); *United States v. Yonn*, 702 F.2d 1341 (11th Cir.) *cert. denied*, 464 U.S. 917 (1983); *LaChappelle v. Moran*, 699 F.2d 560 (1st Cir. 1983); *People v. Mullen*, 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978).

¹¹⁹ *United States v. Rapp*, 871 F.2d 957 (11th Cir.), *cert. denied*, 110 S. Ct. 233 (1989); *People v. France*, 436 Mich. 138, 461 N.W.2d 621 (1990).

¹²⁰ *Wallace v. Duckworth*, 597 F. Supp. 1,2 (N.D. Ind. 1983); *France*, 436 Mich. at 139, 461 N.W.2d at 622.

¹²¹ *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919).

¹²² *Nations v. Sun Oil Co.*, 695 F.2d 933 (5th Cir.), *cert. denied*, 464 U.S. 893 (1983).

¹²³ *South Leasing v. Williams*, 778 F.2d 704 (11th Cir.), *cert. denied*, 481 U.S. 1039 (1985).

¹²⁴ *Vogel v. American Warranty Home Serv. Corp.*, 695 F.2d 877 (5th Cir. 1983).

¹²⁵ *Collins v. State*, 191 Ga. App. 289, 381 S.E.2d 430 (1989).

¹²⁶ *Henry v. State*, 548 So.2d 570 (Ala. 1989).

offenses from conspiracy;¹²⁷ (8) the overt act requirement for conspiracy;¹²⁸ and (9) any jury polling following the verdict,¹²⁹ were found prejudicial and required reversal. Similarly, ex parte communications on nonsubstantive matters, such as responding to a jury note inquiring whether the judge would accept a particular verdict,¹³⁰ or urging a deadlocked jury to continue deliberating,¹³¹ can also result in reversal. The courts disapprove of a per se rule of reversal¹³² and analyze the ex parte communication for actual or potential prejudice.¹³³ Cases finding lack of prejudice look at the substance of the communication,¹³⁴ the responsiveness of the judge's communication to the jury's communication,¹³⁵ the extent of the deliberations after the ex parte communication,¹³⁶ and any curative instructions given to the jury.¹³⁷

Apart from the substance and timing of the ex parte communication, some courts find that the error has been aggravated by

¹²⁷ *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981).

¹²⁸ *United States v. Burns*, 683 F.2d 1056 (7th Cir.), *cert. denied*, 459 U.S. 1173 (1982).

¹²⁹ *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989).

¹³⁰ *Rogers v. United States*, 422 U.S. 35 (1975).

¹³¹ *Shields v. United States*, 273 U.S. 583 (1927); *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981); *People v. Ciaccio*, 47 N.Y.2d 431, 391 N.E.2d 1347, 418 N.Y.S.2d 371 (1979); *People v. Payne*, 149 A.D.2d 542, 540 N.Y.S.2d 256 (1989).

¹³² *People v. France*, 436 Mich. 138, 461 N.W.2d 621 (1990).

¹³³ *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Widgery*, 778 F.2d 325 (7th Cir. 1985); *United States, ex rel. SEC v. Billingsley*, 766 F.2d 1015 (7th Cir. 1985); *Krische v. Smith*, 662 F.2d 177 (2d Cir. 1981).

¹³⁴ *Smith v. Kelso*, 863 F.2d 1564 (11th Cir.), *cert. denied*, 490 U.S. 1072 (1989); *United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988); *United States v. Bustamante*, 805 F.2d 201 (6th Cir. 1986); *United States v. Widgery*, 778 F.2d 325 (7th Cir. 1985); *Skill v. Martinez*, 677 F.2d 368 (3d Cir. 1982); *People v. Aveille*, 148 A.D.2d 461, 538 N.Y.S.2d 615 (1989); *People v. Moran*, 123 A.D.2d 646, 507 N.Y.S.2d 24 (1986).

¹³⁵ *United States v. Rapp*, 871 F.2d 957 (11th Cir.), *cert. denied*, 110 S. Ct. 233 (1989); *United States v. Breedlove*, 576 F.2d 57 (5th Cir. 1978); *Watson v. State*, 728 S.W.2d 109 (Tex. Ct. App. 1987).

¹³⁶ Compare *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981) (verdict reached one-half hour after improper communication) with *Krische v. Smith*, 662 F.2d 177 (2d Cir. 1981) (verdict reached one hour and twenty minutes after improper communication) and *United States v. Rapp*, 871 F.2d 957 (11th Cir.) (verdict reached twenty-seven hours after improper communication), *cert. denied*, 110 S. Ct. 233 (1989).

¹³⁷ *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984); *United States v. Musto*, 540 F. Supp. 318 (D.N.J. 1982).

the manner in which the communication was made. The absence of the judge when a jury inquiry is received and answered can be error. It is improper, for example, for a judge to communicate with the jury through court personnel.¹³⁸ Telephonic communications with the jury is also improper,¹³⁹ as is the judge's personally entering the jury room to answer the jury's questions.¹⁴⁰

A claim that the judge engaged in an improper *ex parte* communication can be waived.¹⁴¹ Counsel's voluntary absence from the courtroom may operate as a waiver,¹⁴² as well as counsel's express consent to the judge engaging in an *ex parte* meeting.¹⁴³ The failure to interpose a timely objection and seek corrective action can also constitute a waiver.¹⁴⁴ A defendant also may waive his right to be present at a conference between judge and jury when he knowingly absents himself from the proceeding.¹⁴⁵ Where a statute or rule expressly commands the defendant's presence, however, counsel's consent to the defendant's absence ordinarily will not operate as a waiver.¹⁴⁶

Conclusion

The integrity of the jury deliberation process must not be infringed by a judge's improper verdict-urging instructions, coercive remarks, or private contacts with deliberating jurors.

¹³⁸ *People v. Ciaccio*, 47 N.Y.2d 431, 391 N.E.2d 1347, 418 N.Y.S.2d 371 (1979); *People v. Miller*, 149 A.D.2d 439, 539 N.Y.S.2d 782 (1989). See also *Parker v. Gladden*, 385 U.S. 363 (1966) (court bailiff's improper communication with jury deprived defendant of constitutional right to be tried by impartial jury).

¹³⁹ *Ortiz v. State*, 543 So. 2d 377 (Fla. Dist. Ct. App. 1989).

¹⁴⁰ *State v. Estrada*, 69 Haw. 204, 738 P.2d 812 (1987).

¹⁴¹ *United States v. Gagnon*, 470 U.S. 522, 527 (1985).

¹⁴² *Karl v. Burlington N.R.R. Co.*, 880 F.2d 68 (8th Cir. 1989).

¹⁴³ *United States v. Musto*, 540 F. Supp. 318, 335 (D.N.J. 1982).

¹⁴⁴ *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984). *In re Air Crash Disaster*, 586 F. Supp. 711, 721 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (1985), *cert. denied*, 488 U.S. 994 (1988); *Watson v. State*, 728 S.W.2d 109 (Tex. Ct. App. 1987).

¹⁴⁵ *United States v. Gagnon*, 470 U.S. 529. This situation assumes that the conference involves a material part of the trial at which defendant's presence would be meaningful. *People v. Mullen*, 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978) (defendant's absence from informal questioning of juror in judge's chambers for possible disqualification not violative of defendant's right to be present).

¹⁴⁶ *People v. Mehmedi*, 69 N.Y.2d 759, 505 N.E.2d 610, 513 N.Y.S.2d 100 (1987).

Appellate courts carefully scrutinize deadlock instructions to determine whether the content or timing of the instructions was coercive. The courts also examine whether other coercive language might have induced a verdict that was the product not of conscientious agreement on the merits but, rather, that resulted from the pressure of time constraints and continued confinement. Although the standards are not uniform, federal and state appellate courts generally examine the judge-jury interaction on a case-by-case basis, under the totality of the circumstances, to determine whether there existed actual prejudice or a clear potential for prejudice.